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No. 82-1845

In The
# Supreme Court of the United States
October Term, 1983

THE STATE OF COLORADO,
*Petitioner,*

vs.

ANTONIO GUADALUPE NUNEZ,
*Respondent.*

On Writ of Certiorari to the Supreme Court of Colorado

## BRIEF OF RESPONDENT

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## QUESTION PRESENTED FOR REVIEW

May Colorado interpret its own state law to require disclosure of a confidential informant in order to conduct a veracity challenge based upon an initial showing that the informant will provide information essential to the merits of his suppression ruling?

TABLE OF CONTENTS

Pages

Jurisdiction ..... 1

Constitutional Provisions Involved ..... 2

Statement of the Case ..... 2

Summary of Argument ..... 4

Argument:

A. The Supreme Court of Colorado decided the Nunez case on independent and adequate state grounds; therefore, certiorari in the instant case was improvidently granted. ..... 8

B. The Colorado Rules governing the merits of a veracity challenge are identical to those announced in *Franks v. Delaware*. ..... 13

C. The Colorado Rule regarding the threshold showing necessary to hold a veracity hearing, which was neither raised before nor decided by the Colorado Supreme Court, is based upon Colorado's interpretation of its own Constitution, is not inconsistent with Federal Law, and reasonably balances the interests involved. ..... 16

1. The Colorado Rule regarding threshold showings is not inconsistent with federal law and reasonably balances the interests involved..... 16

2. The Modification of the threshold showing Standard by the Colorado Supreme Court in Dailey is Based Upon an Independent and Adequate State Ground. ..... 20

TABLE OF CONTENTS—Continued

Pages

3. The issue of the proper threshold showing was never raised before or addressed by the Colorado Supreme Court. ..... 26

D. The Colorado Rule on Disclosure of Confidential Informants is based entirely on State Law, is not inconsistent with Federal Law, and is a reasonable solution to a difficult public policy issue. ..... 27

E. In ruling upon the Motion to Disclose Informant, the Trial Court Judge applied the proper law to the facts and his decision was not clearly erroneous. ..... 33

Conclusion ..... 39

TABLE OF AUTHORITIES

CASES:

Charnes v. DiGiacoma, 612 P. 2d 1117 (Colo. 1980) ..... 23, 24

City of Revere v. Massachusetts General Hospital, — U. S. —, 103 S. Ct. 2979 (1983) ..... 12

Commonwealth v. Abdelnour, 417 N. E. 2d 463 (Mass. App. 1980) ..... 33

Commonwealth v. Douzanis, 384 Mass. 434, 425 N. E. 2d 326 (1981) ..... 20

Cooper v. California, 386 U. S. 58 (1967) ..... 21

Florida v. Casal, — U. S. —, 103 S. Ct. 3100 (1983) ..... 12, 24, 25

Florida v. Smith, 233 So. 2d 396 (Fla. 1970) ..... 25

Fox Film Corporation v. Muller, 296 U. S. 207 (1935) ..... 12

Franks v. Delaware, 438 U. S. 154 (1978) ..... 4, 5, 6, 13, 14, 16, 17, 18, 20

TABLE OF AUTHORITIES—Continued

Pages

Gufstafson v. Florida, 414 U. S. 260 (1973) ..... 22

Herb v. Pitcairn, 324 U. S. 117 (1945) ..... 11

Hernandez v. People, 385 P. 2d 996 (1963) ..... 23

Illinois v. Gates, — U. S. —, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) ..... 21, 27

Jankowitz v. Tollroad Comm'n., 379 U. S. 487 (1965) ..... 25

McCray v. State of Illinois, 386 U. S. 300 (1967) ..... 7, 9, 10, 28

McGoldrick v. Compagnie Generale, 309 U. S. 430 (1940) ..... 26

Mills v. Rogers, 457 U. S. 291 (1982) ..... 21

Murdock v. City of Memphis, 87 U. S. (20 Wall.) 590 (1874) ..... 11

Oregon v. Hass, 420 U. S. 714 (1975) ..... 21

People v. Brethauer, 174 Colo. 29, 482 P. 2d 369 (1971) ..... 19

People v. Brisendine, 119 Cal. Rptr. 315, 13 Cal. 3d 528, 531 P. 2d 1099 (1975) ..... 21

People v. Bueno, 646 P. 2d 931 (Colo. 1982) ..... 8, 9, 15, 29, 30, 31, 34, 36

People v. Cook, 148 Cal. Rptr. 626, 22 Cal. 3d 67, 583 P. 2d 130 (1978) ..... 20

People v. Dailey, 639 P. 2d 1068 (Colo. 1982) ..... 6, 8, 14, 15, 16, 17, 18, 20, 23, 24, 25, 26, 29, 30, 31, 34, 36

People v. Del Alamo, 624 P. 2d 1304 (Colo. 1981) ..... 29

People v. Fish, 660 P. 2d 505 (Colo. 1983) ..... 38

People v. Hoinville, 191 Colo. 357, 553 P. 2d 777 (1976) ..... 23

People v. Kelly, 77 Misc. 2d 264, 353 N. Y. S. 2d 111 (1974) ..... 21

TABLE OF AUTHORITIES—Continued

Pages

People v. Korte, 198 Colo. 474, 602 P. 2d 2 (1979) ..... 29

People v. Langford, 191 Colo. 847, 550 P. 2d 329 (1976) ..... 29

People v. Marquez, 190 Colo. 255, 546 P. 2d 482 (1976) ..... 29

People v. Martinez, 658 P. 2d 260 (Colo. 1983) ..... 8, 15, 29 31, 38

People v. Mason, 185 Colo. 65, 521 P. 2d 1246 (1974) ..... 19

People v. McLean, 661 P. 2d 1157 (Colo. 1983) ..... 38

People v. Nunez, 658 F. 2d 849 (Colo. 1983) ..... 6, 7, 8, 11, 12, 13, 15, 16, 23, 26, 28, 29, 30, 31, 33, 39

People v. Padilla, 182 Colo. 101, 511 P. 2d 480 (1973) ..... 19

People v. Sporeleder, 666 P. 2d 135 (Colo. 1983) ..... 23, 24

Ramsey v. State, 579 S. W. 2d 920 (Tex. Ct. App. 1979) ..... 20

Roviaro v. United States, 353 U. S. 53 (1957) ..... 28

Scher v. United States, 305 U. S. 251 (1938) ..... 27

Smith v. Maryland, 442 U. S. 735 (1979) ..... 24

South Dakota v. Neville, — U. S. —, 103 S. Ct. 916 (1983) ..... 22, 23, 24, 25

Spencer v. State of Texas, 385 U. S. 554 (1967) ..... 7, 9, 10

State v. Kaluna, 520 P. 2d 51 (Haw. 1974) ..... 21

State v. Luciow, 240 N. W. 2d 833 (1976) ..... 32

State v. Paster, 373 So. 2d 170 (La. 1979) ..... 20

State Farm Mutual Automobile Insurance Co. v. Duel, 324 U. S. 154 (1945) ..... 26

TABLE OF AUTHORITIES—Continued

Pages

Terminiello v. Chicago, 337 U. S. 1 (1949) ..... 27

United States v. Alexander, 559 F. 2d 1339 (5th Cir. 1977), *cert. denied*, 434 U. S. 1078 (1978) ..... 33

United States v. Ballesteros-Cordova, 586 F. 2d 1321 (9th Cir. 1978) ..... 38

United States v. Cruz, 581 F. 2d 535 (5th Cir. 1978) ..... 38

United States v. Green, 678 F. 2d 81 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 375 (1982) ..... 38

United States v. Hurse, 453 F. 2d 128 (8th Cir. 1971), *cert. denied*, 414 U. S. 908 (1973) ..... 33

United States v. Jackson, 384 F. 2d 825 (3rd Cir. 1967), *cert. denied*, 392 U. S. 932 (1968) ..... 33

United States v. Kiser, 716 F. 2d 1268 (9th Cir. 1983) ..... 32

United States v. Miller, 425 U. S. 435 (1976) ..... 23, 24

United States v. Robinson, 414 U. S. 216 (1973) ..... 21

United States v. Tolliver, 569 F. 2d 724 (2nd Cir. 1978) 8

Wolf v. Weinstein, 372 U. S. 633 (1963) ..... 12

STATUTES:

28 U. S. C. § 1257(3) ..... 1

OTHER AUTHORITIES:

American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Discovery and Procedure before Trial* (1970 Supp.) § 2.6 ..... 8

C. Sevilla, *The Exclusionary Rule and Police Perjury*, 11 San Diego L. Rev. 839 (1974) ..... 19

TABLE OF AUTHORITIES—Continued

Pages

*Franks v. Delaware: A Proposed Interpretation and Application*, 1980 U. Ill. L. F. 601 ..... 32

Grano, *A Dilemma for Defense Counsel; Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. Ill. L. F. 405, 428-440 (1971) ..... 9, 19

J. Quinn, *McCray v. Illinois: Probable Cause and the Informer Privilege*, 45 Den. L. J. 399, (1968) ..... 9, 11, 20

L. Tiffany D. McIntyre and D. Rottenberg, *Detection of Crime*, 119-120 (1967) ..... 19

Note, *Testing the Factual Basis for a Search Warrant*, 67 Colum. L. Rev. 1529-1534 (1967) ..... 19, 32

W. Lafave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.4 (1978) ..... 33

Colo. Crim. P. 41 ..... 19

Fed. R. Crim. P. 26 ..... 10

Fed. R. Evid. 501, Fed. Rules of Evid. ..... 10

76 A. L. R. 2d 262 ..... 9

Colorado Constitution, Art. II, Section 7 ..... 17, 24, 25

Fourth Amendment, U. S. Constitution ..... 2, 13, 16, 17, 23, 25

Fifth Amendment, U. S. Constitution ..... 2, 22

Fourteenth Amendment, U. S. Constitution ..... 2, 13

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THE STATE OF COLORADO,

*Petitioner,*

vs.

ANTONIO GUADALUPE NUNEZ,

*Respondent.*

On Writ of Certiorari to the Supreme Court of Colorado

## BRIEF OF RESPONDENT

## JURISDICTION

The petitioner seeks jurisdiction pursuant to 28 U.S.C. § 1257(3). The respondent contests jurisdiction on the grounds that the decision being appealed is not a final decision of the courts of Colorado[1] and that the decision

[1]See respondent's Motion to Dismiss for Want of Jurisdiction.

of the Colorado Supreme Court is based upon independent and adequate state grounds.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves portions of the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution:

a. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated . . . Fourth Amendment to the United States Constitution.

b. No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . Fifth Amendment to the United States Constitution.

c. No state shall . . . deprive any person of life, liberty or property, without due process of law; . . . Fourteenth Amendment to the United States Constitution.

## STATEMENT OF THE CASE

On November 7, 1981, pursuant to a search warrant, officers of the Denver Police Department and the Adams County Sheriff's Department searched the house, vehicles, and person of the respondent, Antonio Nunez. During the search, the officers allegedly discovered fifteen balloons of heroin in the respondent's pocket. On February 25, 1982, the defendant filed the following motions: Motion to Suppress, Motion to Disclose Informant, Motion for Disclosure of Deals and/or Compensation. (JA. 13-60).

On September 9, 1982, a motions hearing was held at which time the trial court judge granted the defendant's Motion to Disclose Informant. No other motions were ruled upon by the trial court judge. (J.A. 20-81). The defendant's Motion to Suppress Evidence was *never* decided by the trial court judge, (J.A. 25-77) nor did counsel for the defendant indicate that, for the purposes of a suppression motion, he was not challenging the credibility of the affiant. (J.A. 31-42).[2]

Subsequent to the motions hearing and after the District Attorney indicated the confidential informant would not be disclosed, the defendant filed a Motion to Dismiss, or, in the Alternative, Motion to Suppress. (J.A. 19). This motion was granted by the Trial Court Judge in a written Findings of Fact, Conclusions of Law and Order dated October 7, 1982. (J.A. 91-92).

On October 18, 1982, a notice of interlocutory appeal was filed by the petitioner. (J.A. 34-35).

On February 22, 1983, the Supreme Court of the State of Colorado issued its decision in the instant case affirming the Trial Court's Order requiring disclosure of the confidential informant. (J.A. 135-139).

The State of Colorado subsequently filed a Petition for a Writ of Certiorari in this Court which was granted on October 3, 1983. Subsequent thereto, the respondent filed a Motion to Dismiss for Want of Jurisdiction which was denied by this Court on November 28, 1983.

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[2]A thorough discussion of these events, is contained in Argument, Section E.

## SUMMARY OF ARGUMENT

Given the factual background of the instant case, it is unclear from reading the petitioner's Writ of Certiorari and Opening Brief exactly what issues are before this Court. In both their Writ and Opening Brief, the petitioners attempt to inject issues into this litigation which were never raised before or addressed by the Colorado Supreme Court. In Argument Section E, it is demonstrated conclusively that the only issue ever ruled upon by the District Court Judge and adjudicated before the Colorado Supreme Court was the respondent's request for disclosure of a confidential informant for the purpose of conducting a subsequent suppression hearing. Notwithstanding this fact, the arguments contained in the petitioner's brief appear to encompass three possible separate issues. In this section the respondent enumerates these three issues, argues that only one is properly before this Court, and summarizes the merits of each issue. The three issues suggested by the petitioner are:

1. Whether the State of Colorado enunciated a new rule regarding the proper standard to be met in successfully pursuing a veracity challenge, *on the merits.*

2. Whether the Colorado Rule regarding the type of threshold showing required before a criminal defendant is entitled to a hearing on his veracity challenge is inconsistent with the decision in *Franks v. Delaware,* 438 U. S. 154 (1978). If so, is this standard based on an independent and adequate state ground.

3. Whether the Colorado rule regarding the disclosure of confidential informants for the purpose of conducting a veracity challenge violates the United States Con-

stitution or whether the rule is based upon the Colorado Supreme Court's interpretation of Colorado common law, and therefore relies on an independent state ground.

In addition to the issues directly or indirectly raised by the petitioners, the respondent poses the following question: should the Petition for Certiorari previously granted be dismissed as being improvidently granted in that the Supreme Court's decision on the disclosure issue was based upon an independent and adequate state ground.

The respondent maintains that the instant case presents only two issues to this Court: Whether the Writ should be dismissed as being improvidently granted and whether Colorado's rule regarding the disclosure of confidential informants is violative of the United States Constitution.

With respect to the standards which govern whether a defendant has been successful in his veracity challenge, *on the merits,* the Colorado law is absolutely identical to, and therefore consistent with, the rules of law established in *Franks v. Delaware,* 438 U. S. 154 (1978). In Colorado, a criminal defendant has the burden of proving, by a preponderance of the evidence, that an affidavit filed in support of a search warrant contains errors which resulted from the perjury or reckless disregard for the truth on the part of the *affiant-officer.* If a criminal defendant meets this burden, the erroneous information is stricken from the affidavit and the affidavit is reviewed to determine if it still establishes probable cause. The defendant will ultimately succeed only if the purged affidavit does not establish probable cause. Given the fact that the Colorado Rule is identical to the rule established by *Franks,*

there is no reason for this Court to address this issue. Furthermore, in reaching its decision in *People v. Nunez,* 658 P. 2d 849 (Colo. 1983), the Colorado Supreme Court did not have occasion, nor did it have reason, to pass upon this issue since the only issue raised before it was disclosure of confidential informants.

Similarly, the issue regarding what type of threshold showing must be made by a defendant to entitle him to a veracity hearing was never raised before the Colorado Supreme Court; and therefore, it also is not properly before this Court. However, should this Court take cognizance of this issue the respondent acknowledges that the Colorado Rule regarding threshold showings differs from the rule announced in *Franks.* While *Franks* required a substantial preliminary showing of intentional or reckless falsity on the part of the affiant-officer, the Colorado Supreme Court has deemed it appropriate to accord a defendant a veracity hearing if he shows a good faith basis in fact to question the accuracy of the affidavit for a search warrant. *People v. Dailey,* 639 P. 2d 1068, 1074-1075 (Colo. 1982). In reaching its holding on this issue, the Colorado Supreme Court based its decision on the Colorado Constitution as well as its determination that the *Franks* case does not prohibit a veracity hearing based upon a lesser threshold showing. Therefore, the Colorado Rule regarding threshold showings is based upon an independent state ground, that is, an interpretation of its own constitution. Case law indicates that a state, in interpreting its own constitution and in assessing and managing its own resources may expand upon the due process rights provided to a criminal defendant. Finally, the approach taken by Colorado regarding threshold showings is consistent with

the approach taken by other states and is not unreasonable.

The only motion ever adjudicated in the District Court, the only issue raised to and addressed by the Colorado Supreme Court, and therefore the only issue before this Court is the issue regarding disclosure of informants. The so-called "informer privilege" is a privilege, enjoyed by the government, not to disclose the identity of a confidential informer who provides information to law enforcement agents. The disclosure of confidential informants is a discovery issue which requires the balancing of a defendant's right to discover relevant information versus the government's privilege of nondisclosure. The informer privilege is strictly a creature of common law and each state, in developing and interpreting its own common law, may weigh the competing interests involved to determine the scope and weight of the privilege. Furthermore, neither the *Nunez* decision, nor any of the cases upon which it is based, interpret or infringe upon rights guaranteed by the United States Constitution and any interference by this Court with the *Nunez* determination "would be a wholly unjustifiable encroachment . . . upon the constitutional power of States to promulgate their own rules of evidence . . . in their own State courts . . . *Spencer v. State of Texas,* 385 U. S. 554, 568-569". *McCray v. State of Illinois,* 386 U. S. 300, 313 (1967).

Therefore, the Petition for a Writ of Certiorari, previously granted, should be dismissed as being improvidently granted.

## ARGUMENT[3]

**A. The Supreme Court of Colorado decided the Nunez case on independent and adequate state grounds; therefore, certiorari in the instant case was improvidently granted.**

In deciding the *Nunez* case, the Colorado Supreme Court neither announced nor extended existing precedent. Rather the Colorado Supreme Court merely applied precedents established in other cases[4] to the facts presented in *Nunez*. In short, the *Nunez* decision plays an insignificant role in the evolution of the legal issues which are currently before this Court.

In reaching its decision in *Bueno* and *Dailey*, and in applying the precedents contained therein to the instant case, the Colorado Supreme Court interpreted the common law informer privilege, which is evidentiary in nature, and balanced that privilege against a criminal defendant's right to discover relevant evidence. *See, e. g., United States v. Tolliver*, 569 F. 2d 724 (2nd Cir. 1978)[5]. Unless the result of this balancing test infringes upon rights

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[3]It is the respondent's position that the only issues before this Court are whether the writ should be dismissed as being improvidently granted and whether disclosure of the confidential informant was proper. *See* Summary of Argument. The respondent will discuss the other issues in the event this Court should decide to review them.

[4]*People v. Dailey*, 639 P. 2d 1068 (Colo. 1982); *People v. Bueno*, 646 P. 2d 931 (Colo. 1982); and, *People v. Martinez*, 685 P. 2d 260 (Colo. 1983).

[5]The American Bar Association Project on Standards for Criminal Justice, in its publication *Standards Relating to Discovery and Procedure before Trial* (1970 Supp.) § 2.6 treats the informer privilege as a discovery matter.

guaranteed to criminal defendants by the Federal Constitution, the resolution of this issue is purely a state matter which, under principles of federalism, is exclusively reserved to the discretion of state courts in interpreting their own constitutions and common law. *McCray, supra,* at 313.

The informer privilege is a matter of common law which has been developed through centuries of court decisions.[6] In his law review article, *McCray v. Illinois: Probable Cause and the Informer Privilege,* 45 Den. L.J. 399, (1968), Joseph Quinn, a Justice on the Colorado Supreme Court who authored the opinion in *People v. Bueno, supra,* explained the common law roots of the informer privilege: "Most privileges, including the informer privilege, are generally creatures of statute or judicial rule and have been strictly construed because they are in derogation of the common law policy to uphold disclosure of all relevant facts in the interest of truth." *Id.* at 414. Being a creature of common law, therefore, the privilege does not have a constitutional dimension nor does it call into play any rights guaranteed by the Federal Constitution. *Id.* at 414-417.

This court has forcefully underscored the common law roots of the informer privilege and the exclusive power of states to regulate it. *McCray v. Illinois, supra,* at 313; *Spencer v. State of Texas, supra,* at 568-569. In *McCray,* the petitioners asserted an absolute right to disclosure of confidential informants in a suppression hearing. In rejecting this contention, this court strongly

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[6]See 76 A. L. R. 2d 262; Grano, *A Dilemma for Defense Counsel; Spinelli-Harris Search Warrants and the Possibility of Police Perjury,* 1971 U. Ill. L.F. 405, 428-440 (1971).

stated that disclosure of informants is an evidentiary matter to be interpreted by the individual states based upon state law. *McCray, supra,* at 308.

Although this Court has supervisory responsibility to determine the scope and weight to be accorded the informers privilege when deciding *federal* criminal cases[7], it should not, according to well-settled principles of federalism, interfere with the decision of a state high court interpreting the application of the privilege within its own state court system, *Id.* at 311-313. In fact, this court has specifically recognized that it has neither authority nor jurisdiction to so interfere. "To take such a step would be quite beyond the pale of this Court's proper function in our federal system. It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of states to promulgate their own rules of evidence . . . in their own state courts . . . *Spencer v. State of Texas, supra,* at 568-569", *McCray, supra,* at 313.

The impact of *McCray* upon a state's ability to regulate the informer privilege was described as follows by Justice Quinn:

> The net effect of the Court's rejection of McCray's constitutional claims and the relegation of *Roviaro* to an evidentiary status is to leave the states a freer hand in formulating their own rules of informer privilege. In fact, the Court in *McCray* hinged its decision on Illinois' evidentiary rule as outlined in judicial decisions, which precluded disclosure of the informer's identity where 'the trial judge is convinced by evidence submitted in open court and subject to cross-examination, that the of-

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[7]See e. g., Fed. R. Crim. P. 26; Fed. R. Evid. 501, Fed. Rules of Evid.

> ficers did rely in good faith upon credible information supplied by a reliable informant'.

J. Quinn, *McCray v. Illinois: Probable Cause and the Informer Privilege, supra,* at 416. (footnote omitted).

A review of the Colorado cases, including *Nunez,* which have interpreted and applied the informer privilege demonstrates that these decisions rest on an interpretation of Colorado law and not the Federal Constitution. Therefore, the decision in *Nunez,* which affirms the trial judge's ruling regarding disclosure of a confidential informant, rests exclusively on state grounds and therefore the instant petition should be dismissed as being improvidently granted.

For over one hundred years, this Court has adhered to the principle that it will not review a decision by a state court that is based upon independent and adequate state grounds. This doctrine was first enunciated in the case of *Murdock v. City of Memphis,* 87 U. S. (20 Wall.) 590 (1874). In *Murdock,* this Court determined that even if a federal question was contained in a particular case, review would not be granted if the case was exclusively decided on adequate state grounds.

In *Herb v. Pitcairn,* 324 U. S. 117, 125-126 (1945), this Court expanded upon the operation of this principle:

> This court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [citations omitted]. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own constitution. Our only power over state judgments is to correct

> them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion and if the same judgment will be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than advisory opinion.

*Id.* at 125-126.

Even if a particular decision of a state court rests upon two grounds, one which is Federal and the other which is non-federal, this Court will not take jurisdiction of a case "if the non-federal ground is independent of the federal ground and adequate to support the judgment" *Fox Film Corporation v. Muller*, 296 U. S. 207, 210 (1935). Recent decisions indicate the continuing vitality of the "independent and adequate state ground" doctrine. *City of Revere v. Massachusetts General Hospital*, — U. S. —, 103 S. Ct. 2979 (1983); *Florida v. Casal*, — U. S. —, 103 S. Ct. 3100 (1983) (per curiam). Furthermore, the independent state law basis for a decision often does not become apparent until briefs have been filed and arguments presented. *Wolf v. Weinstein*, 372 U. S. 633 (1963).

Based on the common law basis of the informer privilege, as well as the decision in *Nunez*, itself, the decision of the Colorado Supreme Court to affirm the district court judge's disclosure order was based upon its interpretation of Colorado law and did not seek to interpret any federal law or right. It follows that the decision of the Colorado Supreme Court in *Nunez* is based upon an independent and adequate state ground and, therefore, the instant case should be dismissed.

**B. The Colorado Rules governing the merits of a veracity challenge are identical to those announced in Franks v. Delaware.**

In *Franks* this Court resolved the issue of whether a defendant in a criminal proceeding has a right, under the fourth and fourteenth amendments, to challenge the truthfulness of factual statements contained in an affidavit executed in support of a search warrant. This Court first determined that a defendant is entitled to a veracity challenge upon a "substantial preliminary showing" that the affidavit contained false information.[8] This Court then held that, at the veracity hearing itself, the defendant has the burden of proving, by a preponderance of the evidence, that the *affiant-officer* knowingly and intelligently made a false statement or made a statement with reckless disregard for the truth. If, after the false material is deleted, the affidavit is insufficient to establish probable cause, the search warrant will be voided and any fruits obtained in execution thereof, will be suppressed. *Franks, supra,* at 156-157.

In *Nunez,* the Colorado Supreme Court did not announce a new rule regarding what must be proven at a veracity hearing. In fact, this issue has never been raised at any level of the instant litigation, nor could it have been since the trial court never rendered a decision on the veracity challenge contained in the defendant's Motion to Suppress. Therefore, this issue is not properly before this Court. Notwithstanding this fact, the petitioners now attempt to raise this issue by inferring that the

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[8]This holding, as it compares to the Colorado Rule, is discussed in Argument, Section C.

Colorado Rule regarding what must be proven at a veracity hearing is inconsistent with *Franks*. This assertion lacks merit because the Colorado Rule is identical to the requirements set forth in *Franks*.

The seminal Colorado case in this area is *People v. Dailey, supra*. In *Dailey*, the Colorado Supreme Court reviewed a suppression order entered by a district court judge in the City and County of Denver. The judge below had determined that "all false information in an affidavit for a search warrant must be stricken without regard to the source of the error, before determining its sufficiency to establish probable cause". *Dailey* at 1075. In other words, the *trial court* had not made a distinction between false statements made by the informant as opposed to those made by the affiant-officer. In reversing the trial court's order, the Supreme Court of Colorado stated: "If the source of the error is intentional falsehood or reckless disregard for the truth on the part of the *affiant-officer*, the statements must be stricken from the affidavit and if the remaining statements are insufficient to establish probable cause, the Motion to Suppress must be granted." *Id.* at 1075. (Emphasis added).

In the *Dailey* decision, the Colorado Supreme Court did mention the other possible sources of error in an affidavit and the legal implications that would flow therefrom:

> The errors, however, could have resulted from the informant's perjury or reckless disregard for the truth, or from the negligence or good faith mistake of either the officer or the informant. Other sources of error can be imagined. We consider it inadvisable to attempt to develop the consequences which would follow under the United States and Colorado Con-

> stitutions from each of the various possibilities as to the origin of the error.

*Id.* at 1075.

The issues left open by the Colorado Supreme Court in *Dailey,* the effect of errors based upon the informant's perjury or the negligence or good faith mistake of either the officer or the informant, have not been addressed by the Colorado Supreme Court in any subsequent case.

In its presentation to the Colorado Supreme Court in *Nunez* the petitioner confused the standards set forth in *Dailey* for disclosure of a confidential informant with those necessary to prevail on a veracity challenge. While it is true, under *Dailey* and *Bueno,* that a defendant need not prove perjury or reckless disregard for the truth on the part of the affiant-officer *before obtaining disclosure of a confidential informant* for the purpose of conducting a suppression hearing, the Colorado Supreme Court has never stated that a defendant can be successful *in a veracity challenge* by proving anything less.

In clarifying this point, the Colorado Supreme Court stated: "The people argue that the disclosure of confidential informants is limited to situations in which the veracity of the affiant-police officer is successfully attacked. This contention misapplies the holding of *People v. Dailey*". (J.A. 138). The Supreme Court then proceeded to describe the different possible sources for error in an affidavit. (J.A. 138). After delineating those possibilities, and after applying *Bueno* and *People v. Martinez,* 658 P. 2d 260 (Colo. 1983), the Court announced the actual holding in the *Nunez* case that "the necessary foundation for the court's exercise of discretion in ordering disclosure is a showing of a reasonable basis in fact

to question the accuracy of the informant's recitals." (J.A. 138).

In conclusion, the proper standard to be employed in adjudicating a veracity challenge was never raised before the Colorado Supreme Court in the *Nunez* case. Nevertheless, the Colorado rule, as set forth in *Dailey*, is identical to the rule announced in *Franks* and is therefore consistent with this Court's interpretation of the fourth amendment in this area.

**C. The Colorado Rule regarding the threshold showing necessary to hold a veracity hearing, which was neither raised before nor decided by the Colorado Supreme Court, is based upon Colorado's interpretation of its own Constitution, is not inconsistent with Federal Law, and reasonably balances the interests involved.**

**1. The Colorado Rule regarding threshold showings is not inconsistent with federal law and reasonably balances the interests involved.**

In *Franks*, this Court discussed the circumstances under which a veracity hearing *must* be accorded a criminal defendant. *Franks, supra* at 168. After weighing the competing interests involved, this court decided that the Fourth Amendment requires that a veracity hearing be held if a defendant "makes a substantial preliminary showing that a false statement knowing and intentionally, or with reckless disregard for the truth was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to finding of probable cause the Fourth Amendment requires that a hearing be held at the defendant's request." *Franks,* 438 U.S. at 156-157.

In *Dailey*, the Colorado Supreme Court addressed the identical issue and determined that a criminal defendant is entitled to a veracity hearing if he can demonstrate a "good faith basis in fact to question the accuracy of an affidavit for search warrant . . ." *Dailey, supra*, at 1075.

This determination by the Colorado Supreme Court was based on two grounds: Its interpretation of *Franks and* the Colorado Constitution. In the first instance, the Colorado Supreme Court determined that *Franks* does not *prohibit* a state from granting a veracity hearing upon a lesser showing. Additionally, the Colorado High Court acknowledged the obvious fact that this Court in *Franks* did not "treat the question whether our state constitution requires such a hearing on some lesser showing of probable merit. *See Colo. Const.* Art. II, § 7". *Id.* at 1074. In a footnote to the last quote, the Supreme Court of Colorado states: "In our previous cases we have not explicitly considered the extent to which the federal and state constitutions mandate a hearing to resolve veracity challenges to a warrant affidavit." *Id.* at 1074.

The Colorado Supreme Court's reading of *Franks,* that it does not preclude a hearing upon a lesser threshold showing, is reasonable in light of the concerns which motivated the creation of a threshold standard in the first place. Prior to *Franks*, the state of Delaware had an absolute bar to veracity challenges. Delaware vigorously argued against any interpretation of the fourth amendment which would mandate veracity hearings and thereby strain its judicial and law enforcement resources. In considering these legitimate state concerns, Justice Blackmun's majority opinion set only *minimum* threshold re-

quirements necessary to trigger a hearing on the veracity of an affidavit supporting a search warrant. Justice Blackmun stated: "The rule announced today has a limited scope, both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements *must* be accorded." *Franks, supra,* at 168 (emphasis added).

By so limiting the threshold requirements for a veracity hearing, *Franks* allowed the states to maintain a substantial degree of control over their own court dockets, the weight and respect to be given to the warrant-issuing process, and the burden to be placed on their law enforcement agencies. Also, in deference to their right to frame suitable procedural rules, this Court allowed individual states to determine the appropriate proffer of evidence to be submitted in support of a defendant's request for a veracity hearing. By extending the holding in *Franks* to allow for veracity challenges upon a showing of "some good faith basis in fact to question the accuracy of an affidavit", *Dailey, supra,* at 1074-75, the Supreme Court of Colorado made its own independent determination concerning the proper balance between the rights to be granted to a criminal defendant versus the allocation of its state's judicial and law enforcement resources. In short, the Colorado Supreme Court's determination that a lesser threshold showing is appropriate does not conflict with the concerns expressed in, and the rationale behind, the *Franks* decision. Furthermore, there are strong reasons for more flexible standards regarding threshold showings.

Many commentators have pointed out that, in reality, the warrant—issuing process is often a prefunctory pro-

cedure.[9] Although some states have provisions for presenting a confidential informant to a magistrate or for a hearing prior to the issuance of a search warrant, Colorado law does not provide for either of these alternatives. *See* Colo. Crim. P. 41; *People v. Brethauer*, 174 Colo. 29, 482 P. 2d 369 (1971); *People v. Mason*, 185 Colo. 65, 521 P. 2d 1246 (1974).

In fact, in *People v. Padilla*, 182 Colo. 101, 511 P. 2d 480 (1973), the Colorado Supreme Court held that, in issuing a search warrant, a magistrate is confined in his inquiry to the four corners of the affidavit presented to him. *Id.* at 482.

The previously cited empirical data along with the limitations placed upon the magistrate by Colorado Law, cast doubt as to whether the warrant process can discover and eliminate false statements or statements made in reckless disregard for the truth by affiant-officer. This is particularly true in light of the fact that numerous commentators have described the east of falsifying warrants and the prevelance of police perjury.[10] Furthermore, Colorado's more flexible standard regarding threshold showings is especially reasonable where possession of an illegal substance is the issue. In these types of case, motions to suppress become more important than the actual trial and therefore it is consistent with fundamental fairness to pro-

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[9]Note, *Testing The Factual Basis For A Search Warrant*, 67 Colum. L. Rev. 1529; L. Tiffany D. McIntyre and D. Rottenberg, *Detection of Crime*, 119-120 (1967); J. Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Purgery supra*, at 414-415 (1971 U. Ill. L. F. 405, 114-15).

[10]C. Sevilla, *The Exclusionary Rule and Police Perjury*, 11 San Diego L. Rev. 839, 839-840 (1974); *See* text to footnote 9.

vide a full spectrum of due process rights at this critical stage.[11]

The Colorado Supreme Court is not the only state high court that has created a more flexible standard regarding threshold showings.[12] In fact, at least two states have extended the *Franks* decision by shifting the burden of proof onto the prosecution to explain the source of the error once a defendant has demonstrated that an affidavit contains inaccuracies. *People v. Cook,* 148 Cal. Rptr. 626, 22 Cal. 3d 67, 583 P. 2d 130 (1978), *State v. Paster,* 373 So. 2d 170 (La. 1979).

Therefore, Colorado's creation of a more flexible standard regarding threshold showings is both consistent with the decision in *Franks,* and a natural extension of the reasoning which led to the creation of a threshold showing in the first instance.

**2. The Modification of the threshold showing Standard by the Colorado Supreme Court in Dailey is Based Upon an Independent and Adequate State Ground.**

The decision in *Dailey,* which establishes the Colorado Rule regarding threshold showings, rests on an independent state constitutional ground. *Dailey, supra* at 1074-1075. Therefore, even if this Court should find that the Colorado Supreme Court has extended the minimum requirement for threshold showings established in *Franks* its decision must stand in that it relies on an independent and adequate state ground. This Court has often recog-

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[11]J. Quinn, *McCray v. Illinois: Probable Cause and the Informer Privilege, supra,* 413-417.

[12]See *Commonwealth v. Douzanis,* 384 Mass. 434, 425 N. E. 2d 326 (1981); *Ramsey v. State,* 579 S. W. 2d 920 (Tex. Ct. App. 1979).

nized the right of a State to construe its own constitution as providing more protection than its federal counterpart. *Oregon v. Hass,* 420 U. S. 714 (1975); *Illinois v. Gates,* — U. S. —, 103 S. Ct. 2317, 76 L. Ed. 2d 527, 556-557 (1983) (White, J. Concurring); *Mills v. Rogers,* 457 U. S. 291 (1982); *Cooper v. California,* 386 U. S. 58 (1967).

*Oregon v. Hass,* directly addressed the freedom to be granted to a State in interpreting its own constitutional enactments. In his majority opinion, Justice Blackmun distinguished between a state's interpretation of federal constitutional law, as opposed to its ability to interpret its own constitution. With respect to the former, this Court stated that: "A state may not impose such greater restrictions as a matter of *federal constitutional law* when this court specifically refrains from imposing them." *Oregon v. Hass, supra,* at 720. Conversely, states are granted great flexibility in interpreting their own laws even if it results in granting greater protections to a defendant or imposing more restrictions upon the police than accorded by this Court's interpretation of the Federal Constitution. "A state is free *as a matter of its own law* to impose greater restrictions on police activity than those this court holds to be necessary upon federal constitutional standards." *Id.* at 720.

State supreme courts have also recognized their right to interpret their own constitutions in a manner that exceeds those protections contained in their federal counterpart. *People v. Brisendine,* 119 Cal. Rptr. 315, 13 Cal. 3d 528, 531 P. 2d 1099 (1975); *People v. Kel'y,* 77 Misc. 2d 264, 353 N. Y. S. 2d 111, 117 (1974). In *State v. Kaluna,* 520 P. 2d 51 (Haw. 1974), the Supreme Court of Hawaii declined to follow the rule established by this Court in *United*

*States v. Robinson*, 414 U. S. 216 (1973) and *Gufstafson v. Florida*, 414 U. S. 260 (1973) regarding the circumstances under which body searches are permissible. In electing to establish greater protections based upon state law, the Supreme Court of Hawaii stated:

> This Court has final, unreviewable authority to interpret and enforce the Hawaii constitution. We have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights when logic and a sound regard for the purposes of those protections have so warranted.

*Id.* at 58.

Within the last year, this Court has decided two cases in which a state supreme court interpreted a criminal defendant's constitutional rights more expansively than this Court deemed necessary under the Federal Constitution. In *South Dakota v. Neville*, a case decided on February 22, 1983, Justice O'Connor, in footnote 5 of the majority opinion, addressed whether this Court had jurisdiction to review the underlying decision of the South Dakota Supreme Court. This Court decided it did, in fact, have jurisdiction based upon an analysis that the decision by the South Dakota Supreme Court was not based upon an *independent* state ground. This determination relied on the fact that the South Dakota Supreme Court in interpreting its own constitutional provision, "[had] simply assumed that any violation of the Fifth Amendment privilege also violated, without further analysis, the state privilege". — U. S. at —, 103 S. Ct. 916, n. 5. It was Justice O'Connor's analysis that South Dakota interpreted its own constitution in strict accordance with the relevant portions of the Federal Constitution, as interpreted by this Court. There-

fore, the Supreme Court of South Dakota determined that "every police practice found to violate the Fourth Amendment would, without further analysis, be contrary to the State Constitution as well". *Id.* at 919, n. 5.

The decision in *South Dakota v. Neville* is easily distinguishable from the instant case. Unlike the Neville decision, the *Nunez* case, and more importantly, the *Dailey* case upon which it was based, did not cite federal case law as its authority. Rather, in reaching its decision regarding the proper threshold showing in *Dailey*, the Colorado Supreme Court specifically stated that it might create a more liberal standard based upon the Colorado Constitution. Furthermore, in contrast to South Dakota, Colorado has never stated that it interprets its own constitution in strict compliance with its federal counterpart. In fact, Colorado has a long history of interpreting its constitution in a highly independent manner. *Hernandez v. People*, 385 P. 2d 996 (1963); *People v. Hoinville*, 191 Colo. 357, 553 P. 2d 777 (1976); *Charnes v. DiGiacoma*, 612 P. 2d 1117 (Colo. 1980); *People v. Sporeleder*, 666 P. 2d 135 (Colo. 1983). In these cases, Colorado has granted the criminal defendant greater protections than those provided by this Court's interpretation of the Federal Constitution. In so doing, Colorado has placed greater restrictions upon law enforcement officers.

In *Charnes v. DiGiacoma, supra,* the Colorado Supreme Court acknowledged that in *U. S. v. Miller*, 425 U. S. 435 (1976), this Court had determined that a bank depositor has no reasonable expectation of privacy in checks and deposit slips voluntarily conveyed to the bank and exposed to bank employees in the ordinary course of business. Despite this fact, the Colorado Supreme Court

elected to interpret its own constitution in a more expansive fashion: "*Miller* limits our application of the Fourth Amendment to the facts before us, but it does not determine the scope of protection provided to individuals in Colorado by the constitution of this State." *Charnes, supra,* at 1120.

More recently, in *People v. Sporeleder, supra,* the Colorado Supreme Court, based upon an interpretation of its own constitution, chose not to follow this Court's holding in *Smith v. Maryland,* 442 U. S. 735 (1979). The Colorado Supreme Court stated: "Although Article II, Section 7 of the Colorado Constitution is substantially similar to its federal counterpart, we are not bound by the United States Supreme Court's interpretation of the Fourth Amendment when determining the scope of state constitutional protections." *Sporeleder, supra,* at 140.

In the light of this jurisprudential history, it becomes clear that the *Daily* decision merely extends a long line of cases in which the Colorado Supreme Court exercised its sovereign right to interpret its own constitution differently than this Court's interpretation of a parallel federal enactment. This long tradition of independent interpretation makes this case distinguishable from the facts presented in *South Dakota v. Neville,* and more in line with the holding in *Florida v. Casal,* — U. S. —, 103 S. Ct. 3100 (1983).

On June 17, 1983, the writ of certiorari previously granted in the *Casal* case was dismissed as having been improvidently granted. In a concurring opinion, Chief Justice Burger found that the holding of the Florida Supreme Court rested upon its interpretation of state law,

independent of the fourth amendment even though the Florida opinion did *not* expressly state that it rested, in whole or in part, on state constitutional grounds. Interestingly, Chief Justice Burger noted that the principle state case, *Florida v. Smith,* 233 So. 2d 396 (Fla. 1970), on which the Florida Supreme Court in *Casel* based its decision, "is based entirely upon this Court's interpretation of the fourth amendment of the Federal Constitution". *Casal, supra,* at 3101. In *Dailey,* the Colorado Supreme Court was much more explicit in basing its decision on the Colorado Constitution (Art. II, Section 7). *Dailey, supra,* at 1074.

Even if this Court should interpret the decision in *Dailey* as resting on both state and Federal grounds, it is important to note "the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal, and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corp. v. Muller,* 296 U. S. 207, 210, *Cramp v. Board of Public Instruction,* 368 U. S. 278, 281." *Jankowitz v. Tollroad Comm'n.,* 379 U. S. 487, 489 (1965).

Furthermore, as Justice Stevens indicated in his dissenting opinion in *South Dakota v. Neville* "If a state court judgment is premised on an adequate state ground, that ground must be presumed independent unless the state court suggests otherwise". *Neville, supra,* 103 S. Ct., at 925-26, (Stevens, J. concurring). In an accompanying footnote, Justice Stevens states further "The burden is on the petitioner-appellant to establish our jurisdiction. We have therefore regularly dismissed cases when the state judgment might have rested on an independent and adequate state ground." *Id.* at 926 n. 4.

For all the reasons cited above, the decision of the Colorado Supreme Court in *People v. Dailey,* was based on an independent and adequate state ground. Therefore, should this Court decide that this issue was "pressed or passed upon" in the instant case, the Court should still refuse to disturb the judgment in *Nunez* in that it rests on an independent and adequate state ground.

**3. The issue of the proper threshold showing was never raised before or addressed by the Colorado Supreme Court.**

Quite simply, the petitioner did not mention the issue of threshold showings in its notice of interlocutory appeal, (J.A. 94-97), nor is it raised or discussed in the briefs filed with the Supreme Court. Therefore, the Colorado Supreme Court could not have addressed this issue in reaching its decision in the instant case. As the respondent has argued throughout this litigation, the only issue ever addressed by the trial court or the Colorado Supreme Court was the proper standard for disclosure of confidential informants for the purpose of conducting a hearing on a motion to suppress. In fact, the petitioner, in its opening brief to the Colorado Supreme Court, acknowledges the limited scope of this case "The case at bar is focused upon the preliminary showing that a defendant must make before a Court may order the government to reveal an informer's name." (J.A. 106).

This Court has long held that it will not rule on claims or issues "not pressed or passed upon" in the state court below. *State Farm Mutual Automobile Insurance Co. v. Duel,* 324 U. S. 154 (1945); *McGoldrick v. Compagnie Generale,* 309 U. S. 430 (1940).

In a recent decision, this Court has treated the "not pressed or passed upon below" rule as a prudential restriction as opposed to a jurisdictional bar. *Illinois v. Gates, supra,* at 536. *See also, Terminiello v. Chicago,* 337 U. S. 1 (1949). Often the resolution of the issue depends upon whether the issue that was not ruled on below is an entirely new issue or merely an "enlargement" of an issue actually adjudicated in the Court below. *Illinois v. Gates, supra,* at 536.

In *Gates,* this Court declined to address a challenge to the exclusionary rule based upon a number of sound concerns including the relationship between this Court and state courts, the absence of an adequate record, and the practice of affording a state court an opportunity to address the issue by interpreting its own constitution. *Id.* at 537-538.

By virtue of the same reasoning, this Court should not address the issue discussed herein which was not raised before or adjudicated by the Colorado Supreme Court.

**D. The Colorado Rule on Disclosure of Confidential Informants is based entirely on State Law, is not inconsistent with Federal Law, and is a reasonable solution to a difficult public policy issue.**

*Scher v. United States,* 305 U. S. 251 (1938), is one of the earliest decisions by this Court regarding the disclosure of confidential informants. *Scher* involved the arrest of an individual for the transportation of "phony" liquor. In addition to receiving information from a confidential informant, police officers arrested Mr. Scher based upon their own observations. Mr. Scher sought

disclosure of the confidential informant in support of his Motion to Suppress. In affirming the appellate court's decision, this Court stated that disclosure of an informant would be denied "unless essential to the defense, as, for example, where this turns upon an officer's good faith". *Id.* at 254.

In *Roviaro v. United States,* 353 U. S. 53 (1957), the purpose and application of the informer privilege was explained in greater detail. This Court first defined the informers privilege as the ability of the government to keep secret the identity of individuals who provide information regarding violations of the law to law enforcement officials. *Id.* at 59. After underscoring its importance, this Court stated, however, that the privilege is not absolute or unlimited and when it interfers with fundamental fairness, the privilege must give way. *Id.* at 59-61. Recognizing the limitations on establishing precise standards, this Court called for a balancing test between the public interest in protecting this type of information versus the right of an individual to pursue his defense.

The most recent substantive pronouncement from this Court in the area of confidential informants, is *McCray v. State of Illinois,* 386 U. S. 300 (1967). In *McCray* the Court rejected the notion that the prosecution must always disclose an informant's identity in a suppression hearing. Rather, the Court stated that the decision of whether to disclose "calls for balancing the public interest in protecting the flow of information against the individuals' right to prepare his defense" *Id.* at 310. Of critical importance to the *Nunez* case, the *McCray* decision did not prohibit the states from modifying the informant's privilege in their discretion. Rather, the *McCray* decision

recognizes the right of state courts to regulate the informants privilege as purely a matter of state common law. *Id.* at 308-312. (See Argument, Section A).

By applying the principles established in *Dailey* and *Bueno*, the Colorado Supreme Court in *Nunez* was exercising its discretion regarding the common-law informer privilege. As was discussed earlier, the Colorado Supreme Court's interpretation of the informer privilege does not implicate federal law. Nevertheless, the Colorado rule is consistent with the federal authority cited above.

Colorado has long endorsed the informer privilege which allows the prosecution to withhold the disclosure of the identity of individuals who furnish information to law enforcement officers. *People v. Del Alamo*, 624 P. 2d 1304 (Colo. 1981); *People v. Korte*, 198 Colo. 474, 602 P. 2d 2 (1979); *People v. Langford*, 191 Colo. 847, 550 P. 2d 329 (1976); *People v. Marquez*, 190 Colo. 255, 546 P. 2d 482 (1976). Furthermore, the Colorado Supreme Court has recognized the important public policy considerations inherent in non-disclosure. *Dailey, supra*, at 1076-1077. The Colorado Supreme Court has also recognized, however, that the privilege cannot be absolute and must give way under certain circumstances. *Id.* at 1077.

The decision in *Nunez* was based entirely on the *Dailey, Bueno,* and *Martinez* cases. In *Dailey,* the Colorado Supreme Court stated that in order to obtain disclosure for the purpose of conducting a Motion to Suppress hearing, the defendant must meet the general test of proving that the disclosure of the informant's identity is essential to a fair determination for the Motion to Suppress. *Dailey, supra,* at 1077. The reasoning behind

this aspect of the *Dailey* decision is best expressed in the following passage:

> In order to have a fair opportunity to carry this burden (that the *affiant* committed perjury or reckless disregard for the truth, where, as here, the affiant claims reliance on an unnamed informant, the defendant needs an opportunity to inquire of the informant as to the information given by him to the officer and to develop background information bearing on whether the officer was reckless in relying on the informant as a source of information. Under these circumstances, if the defendant cannot learn the identity of the informant, he will be denied information essential to the merits of the suppression motion.

*Id.* at 1076 (emphasis and parenthesis added).

There is an extremely important aspect of the *Dailey* decision that the petitioner has not discussed. In footnote 11 of *Dailey,* the Colorado Supreme Court states that, in addition to the alternatives of either ordering or denying disclosure, the court may conduct an *in camera* hearing where the informant would be presented to the presiding judge for questioning. In other words, this procedure is available if the trial court judge has doubts regarding whether disclosure is appropriate under the applicable legal standards. In the instant case, however, the district attorney never requested an *in camera* hearing. See footnote 4 of the Colorado Supreme Court's decision in *Nunez,* (J.A. 139).

In *Bueno* the Colorado Supreme Court expanded on the general principles set forth in *Dailey.* First, the Colorado Supreme Court reaffirmed the holding in *Dailey* by stating "a defendant seeking disclosure must make an initial showing that the informant will provide infor-

mation essential to the merits of his suppression ruling." *Bueno, supra,* at 935-936. The Court then proceeded to give an example of a situation which satisfies this standard:

> Thus, a defendant will meet this initial burden when he establishes a reasonable basis in fact to believe that an informer does not exist or, if he does, he did not relate to the police the information upon which the police purportedly relied as probable cause for an arrest or search.

*Id.* at 936.

This statement by the Colorado Supreme Court, along with the general rule regarding disclosure announced in *Dailey,* was the basis for the trial court's decision, (See J.A. 35, 75, 92, and the Colorado Supreme Court's decision, J.A. 138, in the instant case).

The Supreme Court, in *Nunez,* also referred to the case of *People v. Martinez,* 658 P. 2d 260 (Colo. 1983), which focuses on this same standard as well as the important option of an *in camera* hearing.

The Colorado rule regarding disclosure is supported by a number of important public policy concerns. Allegations regarding falsification of warrants and policy perjury are not simply creations of paranoid defendants or overly-zealous defense attorneys. The problem is real and apparently widespread[13]. If an affidavit contains inaccurate or false information and the affiant has claimed reliance upon a confidential informant in obtaining this information, failure to disclose that informant places a virtually insurmountable burden upon the de-

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[13]See text to footnotes 9 and 10.

fendant who seeks to sustain his veracity challenge by proving that the affiant-officer either lied or acted in reckless disregard of the truth[14].

In *State v. Luciow*, 240 N. W. 2d 833, 839 (1976), the Supreme Court of Minnesota recognized the difficulty of meeting this burden in the absence of disclosure: "In some cases where a police officer relies upon an informer, the defendant's right to inquire into the veracity of affidavits would be meaningless absent such disclosure. *See note The Outwardly Sufficient Search Warrant Affidavit: What if it's False?* 19 U. C. L. A. L. Rev. 96, 123." *Id.* at 839. Based on this reasoning, the Minnesota Supreme Court established the standard whereby once a *prima facia* showing is made that *the affidavit* contains material or false statements, the trial court should order disclosure of the informant who gave the information in the affidavit. *Id.* at 839.

In *United States v. Kiser*, 716 F. 2d 1268 (9th Cir. 1983), the Ninth Circuit similarly described a defendant's dilemma in this regard: "A defendant in Kiser's situation has a difficult evidentiary problem. To make a substantial preliminary showing, he must establish a negative that the informant does not exist or uncover the informant's probable identity and the text of his information despite considerable government efforts to protect both." *Id.* at 1271. The Ninth Circuit, therefore, relies on the *in camera* procedure as a means of assisting a defendant in making the necessary threshold show-

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[14]*See generally*, comment, *Franks v. Delaware: A Proposed Interpretation and Application*, 1980 U. Ill. L. F. 601, 619-20; Note, *Testing the Factual Basis for a Search Warrant*, 67 Colum. L. Rev. 1529-1534 (1967).

ing required for a hearing, and of balancing the important competing interests involved. Numerous other courts have endorsed the use of an *in camera* proceeding as a reasonable and just means for resolving this issue. *United States v. Jackson*, 384 F. 2d 825, 827 (3rd Cir. 1967) *cert. denied*, 392 U. S. 932 (1968); *United States v. Hurse*, 453 F. 2d 128, 130-131 (8th Cir. 1971), *cert. denied* 414 U. S. 908 (1973); *United States v. Alexander*, 559 F. 2d 1339, 1344-1345 (5th Cir. 1977) *cert. denied*, 434 U. S. 1078 (1978); *Commonwealth v. Abdelnour*, 417 N. E. 2d 463 (Mass. App. 1980). W. Lafave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.4 (1978).

In conclusion, the Colorado Supreme Court in *Nunez*, affirmed the trial court's order requiring disclosure based entirely on state grounds. Furthermore, the decision of the Supreme Court is not inconsistent with Federal law and is a reasonable resolution of the difficult public policy issues involved in the balancing of a defendant's right to fundamental fairness versus the government's privilege to withhold the identity of confidential informants.

**E. In ruling upon the Motion to Disclose Informant, the Trial Court Judge applied the proper law to the facts and his decision was not clearly erroneous.**

Before discussing the law on this point, two facts warrant reiteration: First, the only motion ever adjudicated by the trial court judge was the defendant's Motion to Disclose Informant (J.A. 40-41, 76-77); and second, the statements of defense counsel regarding Sgt. DeNovellis' credibility did not relate to the veracity challange but to

the defendant's burden in gaining disclosure of an informant (J.A. 34).

Subsequent to the filing of the information in the instant case, the defendant filed a number of motions including a Motion to Suppress and a Motion for Disclosure of Informant. On September 9, 1983, a motions hearing was held. As an introductory matter, counsel for the defendant announced that he had two brief witnesses on the disclosure issue (J.A. 25) and then proceeded to state the reasons why the defendant was entitled to disclosure in order to conduct a veracity hearing. (J.A. 31). At that point, with respect to the disclosure motion, counsel for the defendant stated: "We're not questioning the affiant's credibility, Sgt. DeNovellis' credibility. It's just whether this—." (J.A. 31). Before defense counsel could finish his train of thought, he was interrupted by the Judge. Taken in context, the meaning of counsel's previous statement was to underscore the fact that in order to gain *disclosure* under *Daily* and *Bueno,* a defendant must only show inaccuracies in the affidavit itself and does not have to prove the affiant's perjury or reckless disregard for the truth. In support of this interpretation is the remark counsel proceeded to make immediately following the statement regarding Sgt. DeNovellis' credibility: "Any way, it's a crucial point in the affidavit, in a sense, it goes more to the disclosure of the informant so we can call the informant at the suppression hearing then the Motion to Suppress itself." (J.A. 32).

The District Attorney then proceeded to argue that if the defendant does not question the affiant's credibility, he is not entitled to disclosure. (J.A. 32-34). In response to this argument defense counsel argued that ***at that point*** (prior to disclosure), the defendant could not prove inten-

tional misstatement but could only prove reckless disregard for the truth which is an independent ground for attacking the affiant's veracity. Counsel further stated that only upon obtaining disclosure of the informant could the defendant determine whether the affiant had committed perjury.

> Mr. Stern: If I may respond briefly. My statement about Sgt. DeNovellis—I have no information at this point or presented to the court that he intentionally made any misstatements. I think that if we get the confidential informant disclosed and show he was in fact not at the Nunez residence on the 6th, that would cut to the heart of the Motion to Suppress and second of all, that there was recklessness on the part of the affiant in not verifying the information or checking out the information.

(J.A. 34).

After some further comments by the District Attorney and the Judge, counsel expanded on his earlier statement:

> . . . that would carry the burden that there is a good-faith reason to believe what this person said could not possibly have happened. And, therefore, I think that it would be incumbent upon the court to order disclosure so we could have this *alleged* informant in court to say, well, I did say this or I didn't say this or *I said this and it was changed to this*, to find out exactly what did happen. Otherwise, how would a defendant - . . .
>
> All I know is that we have a confidential informant *or an affiant saying a confidential informant allegedly* told him things that could not have been true. How else can we prove or get to the bottom of what happened without getting this informant disclosed.

(J.A. 38-39) (emphasis added).

After this introductory colloquy, the court proceeded to take evidence on the Motion to Disclose Informant.

> Mr. Stern: Your Honor, I'm a little unclear at this point. Are we going to have evidence on the Motion to Disclose Informant? Because if the court rules that the informant is to be disclosed, we would like the informant to testify at the Motion to Suppress as well —
>
> The Court: Now I understand that Mr. Stern. I've heard it four times—believe me I've got it.
>
> . . .
>
> The Court: Well, as I understand it, the witnesses you are going to call now would be in the same position as if you filed the affidavit setting forth their names and what it is that you rely upon to go outside the four corners of this affidavit for the search form to support your position that the identity of the confidential informant has to be disclosed. Those are the witnesses I'm prepared to listen to.

(J.A. 41-42).

After hearing all the testimony the court stated:

> The Court: All right, I'm prepared to rule upon the Motion for Disclosure of Confidential Witnesses without further argument. If counsel wishes to make argument they are welcome to do so.

(J.A. 72).

The court then proceeded to apply the proper law (*Dailey* and *Bueno*) to the facts presented at the hearing and to order disclosure of the confidential informant. (J.A. 75-77). The District Attorney was then given ten (10) days to file an interlocutory appeal. (J.A. 77). The Motion to Suppress based upon a veracity challenge (as well as other grounds) was to be set for hearing on September 24, 1982, if an interlocutory appeal regarding the

judge's requirement that the District Attorney disclose the informant was not filed. (J.A. 77). This date for a setting of the Motion to Suppress was continued until October 4. (J.A. 84).

Subsequent to the September 9, 1983, hearing the defendant filed a Motion to Dismiss, or in the Alternative, to Suppress based upon the District Attorney's decision to not disclose the confidential informant. (J.A. 19-20, 83). On October 7, 1982, the trial court judge issued written Findings of Fact, Conclusions of Law, and Order. (J.A. 91-92).[15] It is absolutely clear that the judge granted suppression of the evidence based only upon the District Attorney's decision not to disclose the confidential informant. The only issue ever adjudicated therefore, was the respondent's Motion to Disclose Informant. The Supreme Court of Colorado recognized this indisputable fact, it was the only issue that was raised before the Colorado Supreme Court; and, therefore, aside from the issue regarding dismissal of the writ as being improvidently granted, is the only issue before this Court.

In Argument, Section D, the respondents discuss how the decisions of the Colorado Supreme Court regarding disclosure are based upon state law, are not inconsistent with Federal law and are reasonable given the public policy concerns involved. Judge Roan merely applied those principles of law to the facts presented by the instant case. It has long been recognized that Find-

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[15]It is unclear whether Judge Roan ordered disclosure for use at trial as well as for the purpose of conducting a suppression hearing. At different times he indicated that he would grant disclosure for the purpose of trial and at other times that he would not. Compare (J.A. 76) *versus* (J.A. 78-79, *and* 91-92)

ings of Fact by trial court judges must be granted great deference. Several recent decisions by the Colorado Supreme Court underscore this basic prudential concept. *People v. McLean,* 661 P. 2d 1157 (Colo. 1983); *People v. Fish,* 660 P. 2d 505 (Colo. 1983); *People v. Martinez,* 658 P. 2d 260 (Colo. 1983). Courts in the federal system also recognize the wisdom of this policy.

Federal courts, also, will not overturn the findings of a district court unless they are clearly erroneous. For example, the Eighth Circuit Court recently stated that "[w]e will not reverse the findings of the district court, which are based on credibility determinations, as long as substantial evidence exists to support the conclusions reached and no clear error appears on the record." *United States v. Green,* 678 F. 2d 81, 84 (8th Cir. 1982) *cert. denied,* 103 S. Ct. 375 (1982). *See also, United States v. Ballesteros-Cordova,* 586 F. 2d 1321 (9th Cir. 1978); *United States v. Cruz,* 581 F. 2d 535 (5th Cir. 1978).

In the instant case, Judge Roan heard a great deal of testimony and determined that the defendant had met his burden for obtaining disclosure of the confidential informant. A review of the record indicates that there was substantial evidence upon which to base this determination and that it was not clearly erroneous. Therefore, the credibility determinations and the findings of fact entered by Judge Roan should not be disturbed by this Court.

## CONCLUSION

Based on all of the arguments contained herein, the decision of the Colorado Supreme Court in *Nunez* should be affirmed.

Respectfully submitted,

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